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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

[redacted]

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street, N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, DC 20536

File: WAC 01 215 52425 Office: CALIFORNIA SERVICE CENTER Date: APR 29 2003

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:

[redacted]

PUBLIC COPY

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based visa petition was denied by the Director, California Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a corporation organized in the State of California in May 1999. It is engaged in the investment business as well as the medical supply equipment business through a partially owned but separate entity. It seeks to employ the beneficiary as its president and chief executive officer. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager. The director determined that the petitioner had not established a qualifying relationship with the beneficiary's overseas employer. The director also determined that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity. The director further determined that the petitioner had not established its ability to pay the beneficiary the proffered wage of $36,000 per year.

On appeal, counsel for the petitioner asserts that the director's decision is arbitrary and capricious and an abuse of discretion.

Section 203(b) of the Act states, in pertinent part:

> (1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):
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> * * *
>
> (C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement that indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien. 8 C.F.R. § 204.5(j)(5).

The first issue in this proceeding is whether the petitioner has established a qualifying relationship with the beneficiary's overseas employer.

In order to qualify for this visa classification, the petitioner must establish that a qualifying relationship exists between the United States and foreign entities in that the petitioning company is the same employer or an affiliate or subsidiary of the foreign entity.

The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part:

> *Affiliate* means:
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> (A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;
>
> (B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.
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> *Multinational* means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.
>
> *Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

The petitioner claims that the beneficiary's overseas employer owns 100 percent of the petitioner's outstanding stock. The petitioner presented its stock certificate number one issuing 10,000 shares to the beneficiary's overseas employer in May 1999. The petitioner's Internal Revenue Service (IRS) Form 1120, U.S. Corporate Income Tax Return for the year 1999 shows capital stock valued at $156,000.

The same IRS form also reflects on Schedule K that the beneficiary's overseas employer owns 100 percent of the petitioner.

The director, however, requested evidence to demonstrate that the beneficiary's overseas employer had actually paid for the stock issued. The director specifically requested that the petitioner submit copies of wire transfers from the parent company and also include copies of cancelled checks detailing the monetary amounts for the stock purchase. The director requested explanations for all funds not originating with the foreign company.

In response, the petitioner provided information pertinent to its purchase of an interest in a domestic medical supply company. The director determined that the information submitted did not assist in establishing a qualifying relationship between the petitioner and the beneficiary's overseas employer.

On appeal, counsel states that evidence of payment from the overseas entity to capitalize the petitioner is contained in exhibit 7 submitted with the petition. Exhibit 7 contains copies of the petitioner's bank statements for the time period between October 13, 2000 and January 11, 2001. The bank statements show a number of deposits made throughout this time period. The bank statements also show that a debit of $175,000 was deducted from this account. The debit was for a wire transfer that identified the beneficiary's overseas employer as the beneficiary of the transfer. Counsel also references the two previous nonimmigrant intracompany transferee (L-1A) approvals for petitions that the petitioner filed. Counsel asserts that these prior approvals establish a qualifying relationship between the petitioner and the beneficiary's overseas employer.

Counsel's assertion is not persuasive. The stock certificate alone is not sufficient to establish that the overseas entity is the sole owner of the petitioner. A stock certificate is merely written evidence that a named person is owner of a designated number of shares of stock in a corporation. *Black's Law Dictionary* 1430 (7TH Ed. 1999). The director may request such other evidence as the director may deem necessary. 8 C.F.R. § 204.5(j)(3)(ii). As ownership is a critical element of this visa classification, the Bureau may reasonably inquire beyond the issuance of paper stock certificates into the means by which stock ownership was acquired. Evidence of this nature should include documentation of monies, property, or other consideration furnished to the entity in exchange for stock ownership. The petitioner has not provided the additional evidence requested by the director. The petitioner has not provided a reasonable explanation regarding its failure to submit the evidence requested.

The petitioner noted that the Service had previously approved L-1A petitions for this beneficiary. The director's decision does not indicate whether he reviewed the prior approvals of the other nonimmigrant petitions and the record of proceeding does

not contain copies of the visa petitions that are claimed to have been previously approved. However, the Bureau is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals which may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that the Bureau or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery* 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

In sum, the petitioner has not provided sufficient evidence to overcome the director's decision on the issue of qualifying relationship.

The second issue in this proceeding is whether the beneficiary will perform primarily managerial or executive duties for the petitioner.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

> The term "managerial capacity" means an assignment within an organization in which the employee primarily-
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> i. manages the organization, or a department, subdivision, function, or component of the organization;
>
> ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
>
> iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
>
> iv. exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

> The term "executive capacity" means an assignment within an organization in which the employee primarily-
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> i. directs the management of the organization or a major component or function of the organization;
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> ii. establishes the goals and policies of the organization, component, or function;
>
> iii. exercises wide latitude in discretionary decision-making; and
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> iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petitioner initially stated that the beneficiary supervised and controlled the operations of the entire company, including hiring and firing of personnel, directing business strategies, and formulating financial plans for all business operations. The petitioner continued by stating that the beneficiary established policies and overall operational guidelines, exercised wide latitude in personnel management, and that all financial reports and budget plans were subject to the beneficiary's review. In addition, the petitioner noted that the beneficiary negotiated contracts with all suppliers and customers. The petitioner also stated that the beneficiary was the president and chief executive officer for the petitioner's partially owned company. His duties for that company included responsibility for the overall operations of the company, negotiating and engaging the company in business contracts with suppliers and customers, exercising broad discretionary authority in policy formulation, personnel decisions, and overall management strategy.

The director requested a more detailed description of the beneficiary's duties, including the percentage of time the beneficiary spent on each of the duties. The director also requested the petitioner's organizational chart and the job titles and job descriptions of all employees under the beneficiary's supervision. The director further requested copies of the petitioner's IRS Forms W-2 evidencing wages paid to employees.

In response, the beneficiary on behalf of the petitioner stated that he was responsible for all executive decision-making and managerial control and supervised and controlled all human resource decisions. The beneficiary continued by stating that he personally directed business strategies and formulated financial plans for all business operations, reviewed all financial transactions, contracts, purchasing and sales decisions, and established all company policies and overall operational guidelines. The

beneficiary also indicated that he spent approximately 50 percent of his time directing the maintenance and growth of the petitioner. The beneficiary again noted his work with the petitioner's partially owned company and stated that he spent approximately 50 percent of his time as the principal manager of this company.

The petitioner also submitted its organizational chart. The chart depicted the beneficiary as chief executive officer with a purchasing manager, accountant, billing supervisor, and executive secretary reporting directly to the beneficiary. The chart depicted seven other employees in various positions. The petitioner also provided IRS Forms W-2 issued by its partially owned company to the beneficiary and the other employees identified on the petitioner's organizational chart.

The director determined that, since the beneficiary would only be spending half of his time with the petitioner, it was unlikely that the beneficiary would be attending to his duties in an executive capacity with full concentration. The director also noted that the petitioner had not established a qualifying relationship between its partially owned company and the beneficiary's overseas employer. The director concluded from a review of the petitioner's organizational chart that the beneficiary would not be directing any managers, as the positions on the chart included only administrative and technical positions as well as one accountant. The director also determined that the petitioner's description of the beneficiary's duties was vague and general and did not explain the beneficiary's tasks in the day-to-day execution of his duties in the half-time capacity.

On appeal, counsel for the petitioner asserts that the director disregarded the evidence showing that the beneficiary's service with its partially owned company was on behalf of the petitioner. Counsel asserts that, since the petitioner is an investment concern, the beneficiary's appointment as president and chief executive officer of the partially owned company is in the ordinary course of business of the petitioner. Counsel further asserts that the beneficiary's overseas employer indirectly owns a portion of the petitioner's "subsidiary" company, and thus, a business relationship has been established with the beneficiary's overseas employer. Counsel finally asserts that the beneficiary is performing services on both a managerial and executive level on behalf of a multinational organization.

Counsel's assertions are not persuasive. Counsel's assertion that the duties of the beneficiary for the petitioner and on behalf of the petitioner's partially owned company may be viewed together is correct. However, the petitioner must establish that the two companies are significantly interrelated. The statutory definitions of executive and managerial capacity refer to an assignment within an organization in which the employee either manages the organization or directs the management of the organization. Section 101(a)(28) of the Act defines "organization"

as follows: "The term 'organization' means, but is not limited to, an organization, corporation, company, partnership, association, trust, foundation or fund; and includes a group of persons, whether or not incorporated, permanently or temporarily associated together with joint action on any subject or subjects." The statutory definition of an organization would not ordinarily include a partially owned corporation that is an entity separate and distinct from the petitioning organization. However, the petitioner may provide evidence to establish that the petitioner and the petitioner's partially owned entity are either permanently or temporarily associated through controlling ownership, contract, or other legal means. Accordingly, a beneficiary's claimed managerial or executive duties that relate to the partially owned entity may be considered in certain instances for purposes of an immigrant visa petition.

However, in the case at hand, although the petitioner has provided information regarding the petitioner's ownership of the medical supply company, the record contains inconsistencies regarding the petitioner's claimed ownership of this company. The inconsistencies are reflected in the medical supply company's stock ledger. The stock ledger shows that an individual, [redacted] received 2,000 shares of the medical supply company. He subsequently surrendered the stock certificate representing the 2,000 shares. The stock ledger indicates that the 2,000 shares were transferred to two individuals, with each individual receiving 1,000 shares. However, the actual stock certificates, stock certificate numbers eight, nine, and ten, indicate that 1,500 shares were transferred to one individual, with the second individual receiving only 500 shares. This particular transaction is important because the individual allegedly holding the 1,500 shares from this transaction eventually transferred the 1,500 shares to the petitioner. The result of this inconsistency is that the petitioner may hold only 45 percent of the medical supply company, rather than the 50 percent claimed. In addition to the inconsistency contained on the face of the stock ledger, the medical supply company's IRS Forms 1120 for the years 1998 and 1999 also reflect this anomaly. The IRS Form 1120 for 1998 shows two individuals each hold 50 percent of the medical supply company's stock. The IRS Form 1120 for 1999 shows that one of these individuals holds 55 percent of the medical supply company's stock, necessarily leaving the second individual with only 45 percent of the stock. The petitioner received its claimed 50 percent share of the medical supply company from the individual holding only 45 percent of the stock. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988). As noted above, for the beneficiary's duties for this partially owned company to be considered in the determination of the managerial or executive capacity, the petitioner must show either permanent or temporary association

through controlling ownership; otherwise, the petitioner cannot effectively control the beneficiary's appointment to an executive or managerial position.

The petitioner has not provided consistent evidence establishing that it maintains control of the medical supply company's operations. Therefore petitioner has not demonstrated that the beneficiary's duties for the medical supply company should be considered in this petition.

In addition, as the director determined, the petitioner has not provided a comprehensive description of the beneficiary's duties for either the petitioner or the medical supply company. The petitioner's description of the beneficiary's duties borrows liberally from phrases found in the definitions of executive and managerial capacity. Statements indicating the petitioner directs strategies, formulates plans, establishes policies, and exercises wide latitude in personnel management do not convey an understanding of the beneficiary's day-to-day duties sufficient to establish eligibility. Moreover, the beneficiary's negotiation of contracts for suppliers and customers is more indicative of an individual performing the necessary tasks to continue the petitioner's operations. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

Further, despite the petitioner's organizational chart, it appears that the petitioner may only employ the beneficiary. The remaining employees appear to have been paid only by the petitioner's partially owned medical supply company. The petitioner has not submitted sufficient independent evidence to demonstrate that the petitioner employs individuals. Even if the petitioner actually employed the individuals on its organizational chart, or if the employees of the medical supply company were included in this proceeding, the evidence submitted is not sufficient to establish the beneficiary's eligibility. The petitioner has not provided even brief job descriptions of other employees within the organization(s) and has provided a confusing picture of the nature of the petitioner's actual business. Going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Ikea US, Inc. v. INS*, 48 F.Supp. 2d 22, 24-5 (D.D.C. 1999); *see generally Republic of Transkei v. INS*, 923 F.2d 175 (D.C. Cir. 1991) (discussing burden the petitioner must meet to demonstrate that the beneficiary qualifies as primarily managerial or executive); *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). It is, therefore, not possible to determine from the record that the beneficiary will be engaged in a primarily managerial or executive capacity.

The third issue in this proceeding is whether the petitioner has established its ability to pay the beneficiary the proffered wage of $36,000 per year.

The regulation at 8 C.F.R § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petition was filed in June of 2001. The petitioner submitted its initial IRS Form 1120 filing for the year 1999. The petitioner also submitted summaries of the IRS Forms 1120 filed in 1999 and 2000 on its behalf. The petitioner submitted IRS Forms W-2 issued by the petitioner's partially owned medical supply company for the year 2000. However, as noted above, evidence regarding the medical supply company is not relevant because of the lack of consistent evidence connecting and establishing control between the two companies. Counsel's reliance on the petitioner's increase in assets in the year 2000 is not sufficient to establish the petitioner's ability to pay the proffered wages.

In determining the petitioner's ability to pay the proffered wage, the Bureau will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well-established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986)(citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Tex. 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D.Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

The IRS Form 1120 in the record filed on behalf of the petitioner for 1999 shows a net loss of $2,877. The summary of the IRS Form 1120 for the year 2000 shows a net loss of $5,553. Neither return reflects that the petitioner compensated officers or paid salaries or wages. In sum, the petitioner has not submitted sufficient information to show that it had the ability to pay the beneficiary at the time the petition was filed.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section

291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.